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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY RYSKAMP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari Before Judgment
To the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERITORARI

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Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Has the United States (through HAMP, the Collection Financial Standards and other policies and actions) raised the level of scrutiny for transportation—with maintenance, housing, income and employment as indicia—above minimum scrutiny?

2. Has the United States (through these same policies and actions) raised the level of scrutiny for maintenance—with housing, transportation, income and employment as indicia—above minimum scrutiny?

3. Considering that this Court has said, *in District of Columbia v. Heller*, that the levels of scrutiny are merely "prohibitions on irrational laws," has declined to rule on the *Heller* facts based on the scrutiny regime, and has declined to assign a level of scrutiny to the *Heller* facts, which actions have led to contradictory holdings in the lower courts, has this Court in *Heller* and *McDonald v. Chicago* overruled the scrutiny regime and promulgated the doctrine that the Constitution only maintains important facts, among which is transportation?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

APPENDIX iv

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION

I. The Tax Court has jurisdiction as a matter of the Preamble. 6

II. The Tax Court has jurisdiction has a matter of Federal common law. 9

III. The Tax Court has jurisdiction as a matter of Fifth Amendment Due Process. 11

IV. The Tax Court has jurisdiction as a matter of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; this Court has overruled the scrutiny regime and promulgated a new Constitutional regime, the doctrine that the Constitution only maintains important facts. 25

V. The Tax Court has jurisdiction as a matter of Fifth Amendment Equal Protection. 36

VI. The Tax Court has jurisdiction as a matter of the Privileges or Immunities Clause of the Fourteenth Amendment. 39

VII. The Tax Court has jurisdiction as a matter of the Fourth Amendment. 40

VIII. The Tax Court has jurisdiction as a matter of liberty or of Article IV Privileges and Immunities or of the freestanding right to housing. 41

IX. The Tax Court has jurisdiction as a matter of the tax-and-spend provision of Article I, Section 8, the Tax Relief Act, the Federal Reserve Act and monetization. 42

X. The Tax Court has jurisdiction as a matter of Tax Code Section 7122 and the Collection Financial Standards. 43

APPENDIX

Order of the United States Tax Court filed October 7, 2010 a.1

TABLE OF CITED AUTHORITIES

CASES

Abdul-Akbar v. McKelvie,
239 F.3d 307, 316 (3d Cir. 2001) 37

Bolling v. Sharpe,
347 U.S. 497 (1954) 36

DeShaney v. Winnebago County,
489 U.S. 189 (1989) 24, 32

District of Columbia v. Heller,
554 U.S. ____ (2008) 24, 26 et seq., 39-40

Heller v. District of Columbia,
698 F. Supp. 2d 179, 184–86
(D.D.C. 2010) 26

Huxtable v. Geithner,
3:2009cv01846 12 et seq.

Jacobson v. Massachusetts,
191 U.S. 11 (1905) 7

Lawrence v Texas,
539 U.S. 558 (2003) 24, 42

Lindsey v. Normet,
405 U.S. 56 (1972) 11, 13, 21, 30-32

Marbury v. Madison,
5 U.S. (1 Cranch) (1803) 19, 24-25

Marques v. Wells Fargo,
09-cv-1985-L(RBB) 10, 17

McDonald v. Chicago,
561 U.S. ____ (2010) 26, 30 et seq., 39, 42

Palko v. Connecticut,
302 U.S. 319 (1937) 42

United States v. Carolene Products,
304 U.S. 144 (1938) 27 et seq.

West Coast Hotel v. Parrish,
300 U.S. 379 (1937) 27 et seq.

West Virginia v. Barnette,
319 U.S. 624 (1943) 7, 9, 24, 27 et seq.

Wallace v. Commissioner,
37128 T.C. 132 (2007) 20

CONSTITUTION

U.S. Const., Preamble 6-7, 9

U.S. Const., Article I, Section 8 42-43

U.S. Const., Article IV, Section 2, Clause 1 41-42

U.S. Const., Amend. IV 40 et seq.

U.S. Const., Amend. V 11 et seq., 17 et seq., 36 et seq.

U.S. Const., Amend. XIV 24-25, 29, 32, 34 et seq.

STATUTES

Internal Revenue Code, Section 61 20-21

Mortgage Debt Relief Act of 2007 6, 32

Emergency Economic Stabilization Act of 2008 6, 32

Internal Revenue Code, Section 7122 43-44

Federal Reserve Act, Section 2a 42-43

ANNALS OF CONGRESS

James Madison, "Introduction of the Bill of Rights," *The Annals of Congress*, House of Representatives, First Congress, 1st Session, pp. 448-460

INTERNAL REVENUE SERVICE RULINGS

Revenue Ruling 70-341 22

Revenue Ruling 76-131 22

Revenue Ruling 2009-19 6, 8 et seq., 21 et seq.

GOVERNMENT DIRECTIVES AND ANNOUNCEMENTS

Home Affordability and Stability Plan, Executive Summary 23

Supplemental Directive 10-02 23

Supplemental Directive 10-05 23

Department of Housing and Urban Development Mortgagee Letter 2010-23 of August 6, 2010 16

"Press Release,"http: //www. federalreserve.gov/ newsevents/ press/monetary/20101103a.htm (November 3, 2010) 42-43

Collection Financial Standards, http: //www .irs.gov / individuals/ article/ 0,,id=96543,00. html (March 1, 2010) 43-44

OTHER AUTHORITIES

William Treanor, "Judicial Review Before Marbury," 58 *Stanford Law Review* 455 (Issue 2), November 2005 25

Robert Woods, *Tax Notes*, March 3, 2010 7-8

OPINIONS BELOW

The Order of the United States Tax Court is at the Appendix.

JURISDICTION

The Tax Court entered its Order on October 7, 2010. The case is docketed in the Ninth circuit Court of Appeals as No 10-73104, and is pending. This Court has jurisdiction under 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Const., Article I, Section 8

The Congress shall have power to lay and collect taxes...to...provide for the...general welfare...[and to] coin money [and] regulate the value thereof....

U.S. Const., Article IV, Section 2, Clause 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. V

No person shall be...deprived of life, liberty, or property, without due process of law....

U.S. Const., Amend. XIV

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lengthy Statutes as Follows:

Internal Revenue Code, Sections 61 and 7122

Mortgage Debt Relief Act of 2007

Emergency Economic Stabilization Act of 2008

Federal Reserve Act

STATEMENT OF THE CASE

Rule 11 is applicable with respect to this petition

1. because a case pending before this Court, *Ransom v. FIA Card Services, N.A.* (No. 09-907) shares an issue raised in my case: the Constitutional meaning of the Collection Financial Standards; and
2. because the Constitutional nature of the Standards is the subject of disagreement among the lower courts, as recounted in the *Ransom* pleadings.

In addition, the recent oral argument in *Ransom* shows that the Court requires elaboration of the expanded individual rights context—indeed, the new *Heller/McDonald* "maintenance" regime context—in which the Collection Financial Standards are applied in *Ransom*.

In particular, the *Ransom* oral argument shows Justice Ginsburg attempting to preserve discretion in the political system with respect to transportation, when it is the policy of the United States and of this Court that there is no discretion with respect to transportation.

My case provides the "scope" which is lacking in the Ransom arguments and which is mandated by *District of Columbia v. Heller* ("Constitutional

rights are enshrined with the scope they were understood to have when the people adopted them....")

The relief requested in my case is that the Tax Court be found to have jurisdiction, but that is based on my assertion that the Collection Financial Standards—in conjunction with other Government policies and actions, and the rulings of this Court—establish new individually enforceable rights, of which the Commissioner must take account before withholding wages or collecting or assessing income taxes. Among these—according to the Standards themselves—is transportation, either as an independent individually enforceable right or as an indicium of other individually enforceable rights.

In both my case and *Ransom*, it is the Constitutional status of transportation which is at issue.

REASONS FOR GRANTING THE PETITION

I. The Tax Court has jurisdiction as a matter of the Preamble.

In Revenue Ruling 2009-19 in conjunction with HAMP (Home Affordable Modification Program), the Commissioner has established the policy that the determination of the minimization of the risk of housing loss and loss of housing-related facts, and the statement of the new level of scrutiny for housing and housing-related facts, "promote the general welfare."

The Commissioner did so pursuant to the establishment of this policy by the United States itself in the ownership and contract interests of the United States in financial institutions pursuant to the Mortgage Debt Relief Act of 2007 and in the Emergency Economic Stabilization Act of 2008. The Commissioner's policy is that "the general welfare" is the interrelation of all the facts and mutual harmonization of all the rights, relating to housing. Revenue Ruling 2009-19.

Preparatory to promulgating the Preamble policy, the Commissioner has found that housing and its related facts are:

a. facts of human experience
b. which history demonstrates

c. are unaffected by attempts to affect them.

With respect to the Preamble, the policy of the Commissioner, the Secretary of the Treasury, and the United States, "is to withdraw [housing and its related facts] from the vicissitudes of political controversy, to place [them] beyond the reach of majorities and officials, and to establish [them as legal principle] to be applied by the courts." *West Virginia v. Barnette*, 319 U.S. 624 (1943), using the three-pronged test enunciated in *Barnette* in connection with its discussion of the "[u]ltimate futility of...attempts" to affect the *Barnette* facts. The three-pronged test for housing applied by the Commissioner, is the *Barnette* test.

Although "[the Preamble] has never been regarded as the source of any substantive power conferred on the Government," the Commissioner finds that power in the Tax Code, which he regards as "some express delegation of power or in some power to be properly implied therefrom." *Jacobson v. Massachusetts*, 197 US 11 (1905). Indeed, as Robert Wood notes, in the hands of the Commissioner and the Tax Court, the "area continues to evolve, possibly suggesting a more expansive exception to gross income than might first seem apparent. The inquiry whether a payment is for the promotion of the general welfare can be quixotic. The IRS has consistently ruled that the governmental payments must be made on the basis of need." *Tax Notes*, March 3, 2010.

The evolution remarked on, is the Commissioner's expansion of the concept of "need," such that it has become, as a matter of law, an individually enforceable right, and with it, "the general welfare." It is the wedding of the notion of "need" ever more closely to the notion of "the general welfare" and this has been done by the Commissioner, the Secretary of the Treasury and the United States. The final outcome is their promulgation of new individually enforceable rights. As for the "consistent" ruling of need, as we shall see, that is not the fact in this case.

The Commissioner, the Secretary of the Treasury and the United States have progressively substituted for "need" their new concept of "the general welfare": the objective minimization of the risk of loss of housing and housing-related facts, and raising the level of scrutiny for housing and housing-related facts, removing these from the political system and making obsolete such "doctrines" as deference, discretion and minimum scrutiny. Revenue Ruling 2009-19—which, as described below, violates the policy of the General Welfare Exception—in conjunction with HAMP, is a new policy to be enforced by individuals and brought under the rule of law by the Tax Court: the conflation of "need" and "the general welfare" as the minimization of the risk of loss of housing and housing-related facts. The violation of the GWE policy is merely the final expression of the

Commissioner's evolving conflation of "need" and "the general welfare."

Revenue Ruling 2009-19 in conjunction with HAMP and other provisions, is the removal of these facts from the political system, with jurisdiction for the Tax Court, exactly as described in *Barnette*. The Commissioner's policies under the Preamble are to minimize the risk of housing loss and raising the level of scrutiny for housing, and minimize the risk of loss of housing-related facts and raising the level of scrutiny for housing-related facts; thus, the lock-in letter and installment agreement letter are, for purposes of the Preamble, a notice of determination and the Court has jurisdiction.

According to the Commissioner, as a matter of the Preamble the risk to housing and housing-related facts arises and the new level of scrutiny for housing and housing-related facts is found, at every stage of Internal Revenue Service process which is related to housing and housing-related facts. According to the Commissioner's own policy, the lock-in letter and installment agreement letters are process because they are housing-related; in HAMP in conjunction with Revenue Ruling 2009-19, income—as well as other facts such as education, medical care and liberty—are indicia of housing.

II. The Tax Court has jurisdiction as a matter of Federal Common law.

In Marques v. Wells Fargo (09-cv-1985-L(RBB), and in the contracts between banks and HAMP servicers, the Commissioner, the Secretary of the Treasury and the United States have altered the jurisdictional implication of the Notice of Determination. The Notice of Determination is now administrative custom in any housing-related IRS process, and its absence or presence is not determinative as to whether the Tax Court has jurisdiction. According to the Commissioner's own policy, the lock-in letter and installment agreement letters are process because they are housing-related. The facts clearly show an individually enforceable right to a HAMP modification based on what is in FACT the minimization of risk of loss of housing and housing-related facts. For purposes of the "Agreement" in *Marques* as it relates to the Federal common law, the lock-in and installment agreement letters are housing-related process. As a matter of Federal common law with respect to the lock-in and installment agreement letters, the risk to housing arises and the new level of scrutiny for housing is found, at every stage of Internal Revenue Service process which is related to housing: that is the Commissioner's policy as a matter of Federal common law. The Commissioner's policy is that Federal common law is the interrelation of all the facts and mutual harmonization of all the rights, relating to housing. The *Marques* Court makes it clear that the notion

that the Defendant and the Plaintiff "contacted" one another, and whether Defendant "considered" modification are process relating to housing. Opinion at 10. For purposes of Federal common law, they are the lock-in and installment agreement letters and so the Tax Court has jurisdiction.

III. The Tax Court has jurisdiction as a matter of Fifth Amendment Due Process.

Incentive is not need: that is the basis Commissioner's change of jurisdictional policy in Revenue Ruling 2009-19 in conjunction with HAMP. In doing so, the Commissioner has moved housing far above *Lindsey v. Normet* minimum scrutiny and this Court has removed the scrutiny regime from its jurisprudence, with the result that a right to housing is now individually enforceable through the Tax Court.

The United States is entitled to raise the level of scrutiny for housing—creating an individually enforceable right—if it chooses to do so. It has done so, rejecting the *Lindsey* minimum scrutiny option for housing, and altering its policies to reflect the removal, by this Court, of the scrutiny regime from its jurisprudence. The Federal District Court for the Southern District of California refused to dismiss a complaint claiming a Fifth Amendment procedural Due Process right

in HAMP in conjunction with Revenue Ruling 2009-19, precisely because the Commissioner, the Secretary of the Treasury and the United States had, through money supplied to banks, created an individually enforceable right to the interrelation of all housing and housing-related facts and the harmonization of all rights in housing and housing-related facts. *Huxtable v. Geithner*, 3:2009cv01846.

There, as here, the question is whether the United States has overstepped its own claimed bounds and thereby created new rights. In *Huxtable*, the question is whether there is "a sufficiently close nexus between the (government) and the challenged action of the (private) entity" to say, for Fifth Amendment Due Process purposes, that government action is involved in the HAMP program in conjunction with Revenue Ruling 2009-19, particularly through United States funding of the relevant banks and through contracts between the United States and servicers. The answer is, Yes.

The *Huxtable* case was dismissed without the plaintiffs ever responding to the motion to dismiss (presumably because a settlement was reached). Nevertheless, I discuss the issues raised in the dismissal because the standards are relevant here. Revenue Ruling 2009-19 in conjunction with HAMP, converted a benefit into an entitlement by substituting incentive for need; note that this is a

part of the process of financial institutions receiving Government funds. In doing so, the Commissioner, the United States and the Secretary of the Treasury created a substantive and procedural right to the minimization of the risk of housing loss, and a higher level of scrutiny for housing than that provided in *Lindsey v. Normet*, and a substantive and procedural right to minimization of the risk of loss of housing-related facts and a higher level of scrutiny for housing-related facts. It has also conformed its policies to the removal, by this Court, of the substitution of a "maintenance" regime in place of the scrutiny regime.

The *Huxtable* Court, adopting, as was required, the defendant's arguments on the motion to dismiss, reminds us of what a Due Process entitlement does *not* involve. The Commissioner's Due Process procedural and substantive policies in Revenue Ruling 2009-19 in conjunction with HAMP, do not have any "appropriateness" component. Neither the Commissioner nor the United States may "grant or deny [them] in their discretion." It is not the policy of the Commissioner and United States that they are not "obligated" by their new policies, or that they are not obligated to "participate" in them, that they did not intend to create an "entitlement or protected property interest" by the policies, that they can "opt out" of the policies, or that the policies "preclude" the rights.

Quite the contrary: it is the policy of the Commissioner and the United States in their Due Process procedural and substantive policies in Revenue Ruling 2009-19 in conjunction with HAMP that these policies comport, and are intended to comport, with Fifth Amendment Due Process. Indeed, there is even **less** question that the Fifth Amendment rights have been established than in *Huxtable*, because Revenue Ruling 2009-19 in conjunction with HAMP is **explicitly** grounded on "incentive" while claiming to conform to the General Welfare Exception; on the other hand, the word "need"—the essence of a GWE—is **never** used. Revenue Ruling 2009-19 in conjunction with HAMP explicitly violates all tests of the GWE. Revenue Ruling 2009-19 in conjunction with HAMP is an explicit statement of individually enforceable rights. Revenue Ruling 2009-19 purports to create a General Welfare Exception adjustment to gross income, but it actually violates all the GWE standards, and instead creates a policy of the minimization of the risk of housing loss through payments to the taxpayer. The Ruling states:

> Under HAMP, homeowners that make timely payments on their modified loans are eligible to have incentive payments made on their behalf to lenders/investors. Each month that a homeowner makes a mortgage payment on time, the homeowner accrues an amount toward a Pay-for-Performance Success Payment. A payment of the accrued amounts is made annually, to reduce the principal balance on the

homeowner's mortgage loan. Homeowners can receive principal reductions of up to $1,000 per year for up to five years, subject to a de minimis threshold.

The requirements of an adjustment to gross income under GWE are that the GWE payment be: 1. made from a governmental general welfare fund; 2. for the promotion of the general welfare (that is, on the basis of need rather than to the general population); and 3. not made as payment for services. However, the Ruling fulfills none of the requirements of a GWE—indeed the Ruling makes a farce of the GWE, and establishes quite different policies. Specifically:

1. **The Ruling's so-called adjustment to gross income is not made on the basis of need.** The adjustment to gross income is a sham; the United States itself has explicitly repudiated need as a basis. It is based on what the Government itself calls an "incentive." The Service's position is that the so-called adjustment to gross income is an incentive, and thus not made on the basis of need as required of a General Welfare Exception adjustment.

This alone reveals the Service's true policy in contradiction to its statement about an "adjustment." There is no adjustment. The so-called adjustment allowed by Revenue Ruling 2009-19 in conjunction with HAMP is actually a policy to minimize the risk of housing loss, and as such is

available to the general population—for example, the so-called adjustment in conjunction with HAMP is made available indiscriminately to those who either have or have not forefeited title to their housing. That the policy of Revenue Ruling 2009-19 in conjunction with HAMP, is not need-based, is, once again, made explicit in the later Department of Housing and Urban Development Mortgagee Letter 2010-23 of August 6, 2010. Again, there is no claim here that the "loan" is based on need at all. The policy is explicitly an incentive to minimize the risk of housing loss and raise the level of scrutiny for housing. There is no confusion about what is promulgated in Revenue Ruling 2009-19 in conjunction with HAMP—new rights are promulgated.

And, again, we see that incentive as an individually enforceable entitlement, has replaced need (which is traditionally considered to be at the discretion of, and with deference to, the political system) in Supplemental Directive 10-05, https: //www. hmpadmin. com/ portal/ docs/ hamp_servicer/sd1005. pdf. This is the Principal Reduction Alternative. It is a "deferred principal reduction program" that allows the homeowner to earn a principal reduction over a three-year timeframe by making all payments in accordance with the loan's modified terms.

This is the "flip" side of Revenue Ruling 2009-19, with "incentives" to investors, thus

making it ever clearer that the policy of "incentives" is an individually enforceable right to the minimization of the risk of housing and housing-related facts and raising the level of scrutiny for housing and housing-related facts. Under the PRA, servicers are required to evaluate the benefit of principal reduction for every HAMP eligible loan with "high negative equity," which Treasury defines as having a mark-to-market loan-to-value ratio greater than 115%. The crucial aspect here is that servicers are required to evaluate a property's suitability.

Once again, servicers are drawn in under a Fifth Amendment Due Process right to housing, enforceable by the Tax Court. As for the investors, "[f]or each loan modified under PRA, investors received the Investor Payment Reduction Cost Share and if applicable: (i) the one-time current borrower incentive payment described in Supplemental Directive 09-01 and (ii) the Home Price Decline Protection incentive payments described in Supplemental Directive 09-04." And what is the basis for offering principal reduction? In the words of the Secretary of the Treasury, it provides "financial incentives for principal reduction."

2. **There is no GWE payment; this is a farce and a sham.** The Ruling in conjunction with HAMP is an "incentive" payment to the taxpayer through a sham: the simple reduction in

outstanding mortgage balance on mortgages with respect to which the United States has both an ownership interest and a contract right (as shown in both *Huxtable* and *Marques*). There is no payment for purposes of complying with a General Welfare Exception. Considered through a proper application of the General Welfare Exception, individuals paying on their modified mortgages are simply working for the United States; in short, they are "GWE workers" performing services for mortgage reductions.

The initial reductions (putatively based on "need") are already payments from the United States on instruments with respect to which it has both an ownership interest and a contract right. Farce on farce. Then to go on and supposedly invoke the traditional GWE, using such terms as "incentives" for "payments" on "mortgages"—this is simply a farce using sham terms. The Commissioner is not proceeding on the basis of a GWE theory: the Commissioner is proceeding on a new policy of minimizing the risk of the loss of housing and housing-related facts, and raising the level of scrutiny for housing and housing-related facts. Any other conclusion merely advances the Tax Court's policy of tautology, which is a violation of Fifth Amendment Due Process because it is devoid of fact and is purely a prejudice in favor of arbitrary government.

Arbitrary government, as *Marbury v. Madison*, 5 U.S. (1 Cranch) (1803), has taught us, is no government at all. The provision that there be "no payment for services" is rendered moot by the principal reductions, since there is no distinction between them and payments to the taxpayer for services: "need" has been removed by the Commissioner. The terms themselves are rendered obsolete by the facts of joint action under the Due Process Clause and contract under Federal common law. But now the Tax Court comes before this Court and nevertheless seeks to preserve the adjudicative nature of terms—mere labels—when both the facts and the law show that the Commissioner, the Secretary of the Treasury and the United States have promulgated new individually enforceable rights. But the latter do join the former in a ridiculous attempt to preserve, behind mere labels, arbitrary power, prejudice and the discretion to act, and the expectation of being deferred to in their actions without rational basis, that is, without any facts to back them up.

The "incentive" is explicit evidence of a new policy, just as the Government ownership stakes and contracts are explicit evidence of the Due Process right. The sham is the Government and the Tax Court trying to retain power already given up. The Tax Court has jurisdiction. Although the notion here of "payment for services" has been obliterated by the Commissioner in the context of the General Welfare Exception, this obliterating

action is fully in line with the evolution of customary terms such as "services," "income," "need" and "the general welfare," which terms the United States either replaced, rendered outmoded or for which it has provided entirely new definitions. The Tax Court itself is here showing that it is evolving legal notions from "discretion," "deference" and "minimum scrutiny" to individually enforceable rights through a policy of the minimization of the risk of loss of housing and housing-related facts and raising the level of scrutiny for housing and housing-related facts. For example, the Commissioner argued in *Wallace v. Commissioner* (37128 T.C. 132 (2007), Doc 2007-9677, 2007 TNT 74-9) that the monies paid to the taxpayer "for his participation in [a Veterans Administration work therapy program] are unlike those payments made to taxpayers under legislatively provided-social-welfare-benefit programs." The Service argued that under the VA program, the taxpayer undertook compensated work therapy (sweeping floors and moving offices) so the nature of the payments to the taxpayer (compensatory) brought the income within the ambit of Section 61. The Tax Court disagreed: "While petitioner was compensated...we are inclined to conclude that distributions of that class are not simply payments for services rendered. There is a welfare (noncompensatory) aspect to them that inclines us to classify them as benefits along with other payments, such as education, training, and subsistence allowances."

This "aspect" is the minimization of the risk of loss of housing and housing-related facts, and raising the level of scrutiny for housing and housing-related facts. Even the Tax Court is making a factual judgment as to important facts, and then removing them from the political system. Lapsing into tautology is contradictory and unconstitutionally vague.

3. **The principal reduction does not come from a governmental general welfare fund.** The so-called adjustment to gross income is made pursuant to the HAMP reduction, which is made pursuant to TARP, which is a trust fund, not a governmental general welfare fund. Revenue Ruling 2009-19 in conjunction with HAMP, does not establish an adjustment to gross income. It is a payment to the taxpayer pursuant to a policy of minimizing the risk of housing loss and raising the level of scrutiny for housing above the standard set in *Lindsey v. Normet*, and bringing the United States into conformity with the removal, by this Court, of the scrutiny regime from its jurisprudence.

What is more, this change of policy is the inevitable outcome of the long-evolving doctrine of the United States that "need" is simply the minimization of the risk of loss of important facts. Internal Revenue Code Section 61 provides that, gross income includes all income from whatever source derived unless excluded by law. The IRS

and the Federal courts have consistently held that payments made under legislatively provided social benefit programs for the promotion of general welfare are not includable in the recipient's gross income. First, the general welfare doctrine originated in a 1938 decision by the IRS to exempt the Social Security system, which is not a means tested program. Second, in Revenue Ruling 70-341, 1971-2 C.B. 31, the IRS ruled that government provided health care benefits for the elderly, commonly known as Medicare benefits, are nontaxable to all recipients, not only to those in financial need. Third, federal and state governments commonly provide vaccinations and basic health tests to all citizens free of charge. Revenue Ruling 76-131, 1976-1 C.B. 16 explicitly lists health as a need that promotes the general welfare. Obviously, it is for the Commissioner to reveal to the Tax Court which facts are related to housing; evidently the Commissioner is harboring a good number of them. Which ones? I have a right to know.

Failure to make a determination of the minimization of risk of housing loss and minimization of the risk of housing-related facts, and to state the new level of scrutiny for housing and housing-related facts, **prior** to the issuance of the lock-in letter and the installment agreement letter, is in violation of my Fifth Amendment Due Process right to request a change of determination and to respond to the installment agreement letter.

The issues to be determined are, what in **fact** is the minimization of the risk of housing loss and what in **fact** is the minimization of the risk of the loss of housing-related facts, and what is the Commissioner's level of scrutiny for housing and housing-related facts? That this is an issue, is, once again, conceded in advance by the Commissioner in Revenue Ruling 2009-19 in conjunction with HAMP. He makes it an issue. Why isn't it one for the Tax Court? We know the Commissioner feels the minimization, in fact is: 31% of gross monthly income. See Supplemental Directive 10-02.

Or do we? HAMP provides for the consideration of other factors, including education, education and medical care. In the Home Affordability and Stability Plan, relief is pure incentive, not based on need, and based simply on owing more than 80% of the value of the home. "Home Affordability and Stability Plan, Executive Summary," March 2009. http: //www.financial stability.gov/latest/tg.33.html. What is more, the Secretary and the United States are not even firmly wedded to the "31%" concept. Under PRA, according to Supplemental Directive 10-05, "[s]ervicers will qualify for PRA investor incentive payments as set forth in this Supplemental Directive for reductions creating a MTMLTV ratio as low as 105 percent, even if the reduction results in a monthly mortgage payment ratio below the 31 percent target." This "target" is on its face unconstitutionally void for vagueness. What we do

know is that, in formulating its standard, the United States used the *Barnette* test: it asked itself, What, historically, minimizes the risk of housing loss? This is the same test which has recently been used by this Court to expand individually enforceable rights. See *Lawrence v Texas*, 539 U.S. 558 (2003) and *District of Columbia v. Heller*, 554 U.S. ____ (2008). It is no longer the policy of the United States, the Secretary of the Treasury or the Commissioner that the Fourteenth Amendment or the Fifth Amendment were intended merely "to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,'...." Quite simply, it is the policy of the United States, the Secretary of the Treasury and the Commissioner that this formulation, from *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), is no longer good law.

The *Barnette* formulation is, in turn, a restatement of the formulation in *Marbury v. Madison*, in which the "principals" violated by the Act found unconstitutional are the important facts. For the *Marbury* Court, that Act sought to eliminate "principles...most conducive to [the people's] own happiness." It would not succeed in doing so because the "principles" would be "repeated." This repetition is the test articulated further in *Barnette*. History had shown that the "principals" were unaffected: as to "a rule as operative as if it was a law," "[t]here are many

other parts of the constitution which serve to illustrate" it. In the present case, the Court's dismissal, far from applying the law to the facts—the lock-in letter and the installment agreement letter—merely served up a tautology: a notice of determination is a notice of determination. *Marbury* perfectly describes the Court's dismissal as well as the contradictions in the statements of the Secretary of the Treasury, the Commissioner and the United States: they are "extravagant" assertions that "the constitution should not be looked into."

And yet it "is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each." And so the Tax Court has jurisdiction. This Court is also "the Judicial Department" and must now "look into" the Constitution and not be satisfied with tautology. 5 U.S. (1 Cranch) at 137, 176, 177, 179. The *Marbury* formulation is, in turn, a restatement of pre-*Marbury*, and indeed, pre-Constitutional formulations. William Treanor, "Judicial Review Before Marbury," 58 *Stanford Law Review* 455 (Issue 2), November 2005.

IV. The Tax Court has jurisdiction as a matter of the Due Process and Equal

Protection Clauses of the Fourteenth Amendment; this Court has overruled the scrutiny regime and promulgated a new Constitutional regime, the doctrine of which is that the Constitution only maintains important facts.

The oft-criticized scrutiny regime is now defunct, but the lower courts are in disarray as to whether this is the law, and this case—which concerns the Constitutional level of scrutiny for housing—permits this Court to clarify the new Constitutional regime. For a recent decision usefully summarizing the disarray in the lower courts, see *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 184–86 (D.D.C. 2010). To be sure, this Court in *District of Columbia v. Heller* ruled that the "scrutiny regime" is not an actual Constitutional regime, but merely a ban "on irrational laws." Justice Stevens' dissent didn't even use a "scrutiny regime" analysis. Obviously, this "regime" is now over. Nevertheless, there is confusion because of *McDonald*, which proposes several formulations of the new regime: (1) the Due Process Clause; (2) the Privileges or Immunities Clause; (3) Justice Stevens' novel "Liberty Clause" approach; and (4) Justice Breyer's "popular consensus" approach. The *Heller* District Court notes that "[m]any [*Heller*] courts have managed to rule on the constitutional issues without determining what standard of review

applies" or have found that the facts are simply not *Heller* facts; following this Court, the lower courts are abandoning the scrutiny regime. This Court's new regime is that the Constitution does only one thing: it maintains important facts. The inquiry is one of "scope." "Scope" means that only facts—not balancing, discretion or deference—argue, and only rights, and not the "regime," rule now. Clearly, the United States Government has left far behind, the scrutiny regime previously thought to be found in *United States v. Carolene Products*, 304 U.S. 144 1938) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). In the case of housing and housing-related facts, it has decided—in the words of *Barnette*—"to withdraw [them] from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." That is why this petition is before the Court. This Court has pursued the same course as the United States: the scrutiny regime no longer exists in its jurisprudence, and the petition asks this Court to apply its new jurisprudence of the maintenance of important facts. This Court now says that the regime previously thought to be found in *Carolene Products* and *West Coast Hotel*, was found there in error. No clearer evidence of the removal of the scrutiny regime from its jurisprudence, could exist than this Court's ripostes to Justice Breyer's "by the book," canonical invocation of the scrutiny regime in *Heller*. The Court did what the United States

Government has done for housing and housing-related facts: the Court rejected the scrutiny regime *entirely*. Most notably, the Court used the *Barnette* test to demonstrate that the only result of attempts by the Crown "to disarm the inhabitants" was the Revolution, as well as the Second Amendment, thus demonstrating that the *Heller* facts were facts of human experience which history demonstrated are unaffected by attempts to affect them. This is the same analysis applied by the United States to housing.

West Coast Hotel and *Carolene Products* now have an entirely new meaning. In *Heller*, the Court rejects the notion of "a level of scrutiny" as well as the notion of an "'interest-balancing inquiry.'" Indeed, it goes on to provide a new gloss on the *Barnette* result for a fact meeting the *Barnette* test: "the very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." The United States has decided that housing and housing-related facts are a "constitutional guarantee."

In its *Heller* comments, this Court filled a lacuna of two hundred years' standing in James Madison's statement that the Bill of Rights is "an impenetrable bulwark against every assumption of power in the legislative or executive." *The Annals of Congress*, House of Representatives, First Congress, 1st Session, pp. 448-460. By leaving out the judiciary in this enumeration, the question arose whether there was some balancing, discretion or deference inherent in the judiciary. This Court, in *Heller*, has now answered that question. ***The answer is, No.***

The term "scope" is used here, by the Court, in the same way the Court uses it in *Barnette*: "We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments." Even *West Coast Hotel* only uses "scope" ("the scope of the police power") to mean the vindication of "maintenance" as a *Barnette*-style important fact.

And this Court has now clarified that *Carolene Products'* footnote 4 notion of "scope" ("narrower scope for operation of the presumption of constitutionality") harmonizes with that opinion's definition of "scope" ("scope for the legislative judgment") as the maintenance of *Barnette*-style important facts.

Indeed, there is no balancing, discretion or deference which plays into "scope." There are, if

anything, only *Heller*'s "historical justifications for...exceptions;" that is, nothing takes the analysis out of the *Barnette* analysis. The Court in *Heller* is absolute with respect to health and welfare regulation—the scrutiny regime—as it relates to important facts: there is no such thing. There is "no permission or regulation of law for the purpose." Health and welfare regulation is out the window with respect to important facts. There is only the *Barnette* test, in which what is in fact the best argument, always wins.

One question remains: what has the United States determined is in fact that "scope" for housing and housing-related facts? This is what the petition requests that the Court require the United States to provide. The *Lindsey* Court says:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of recent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

This ridiculous old prejudice is not the policy of this Court or of the United States. Indeed, the *Heller* Court would query the *Lindsey* Court: "In what sense, 'importance'?" It would require the *Lindsey* Court to undertake a *Barnette* analysis,

and according to the United States Government, housing would win that analysis and the *Lindsey* Court would lose. "Self-defense" in the *Heller*-clarifying case of *McDonald v. Chicago*, 561 U.S. ____ (2010) means, the maintenance of important facts as those are found by applying the *Barnette* test. This Court, in *McDonald*, reiterated its *Heller* holding, calling the scrutiny regime "a bygone era." The Municipality's standard scrutiny regime argument that "if it is possible to imagine *any* civilized legal system that does not does not make that right binding on the States," then the right is not binding, was called by this Court "of course, inconsistent with the long-established standard we apply in incorporation cases."

According to *McDonald*, maintenance of important facts—and not the notion of deference to or discretion in government—is now exclusively what the law does. For the United States Government, "scope" means housing and housing-related facts. Applying *Barnette*, what is in *fact* the better argument, wins every time, without deference to or discretion in the political system, allowed to influence the result.

What does this mean in terms of discretion, deference, balancing and health and welfare regulation? It means that these terms have been discarded by a mandate "to devise solutions to social problems that suit local needs and values," and *that*, according to this Court, is the

maintenance of important facts applying the *Barnette* test. That, in turn, is "scope."

In bygone scrutiny regime terms, the United States has overruled the following holdings, and this Court is being asked to acknowledge that that has happened, and to require that the Commissioner provide factual "scope" clarification.

In *Lindsey*, the Court complains that, in connection the claimed right to housing as a matter of Fourteenth Amendment Due Process and Equal Protection. The answer is that the Commissioner, the Secretary of the Treasury, the United States and this Court have now provided what the *Lindsey* Court could not "perceive," a "constitutional mandate" which is now a "judicial...function." *Lindsey* is no longer good law. The provision is made by this Court, and by the United States itself in its ownership and contract interests in financial institutions pursuant to the Mortgage Debt Relief Act of 2007 and in the Emergency Economic Stabilization Act of 2008, under which authority it set up TARP, HAMP and purchased ownership stakes and entered into contracts.

In *DeShaney*, the Court "recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." The

Commissioner, the Secretary of the Treasury and the United States have now conferred that right. *DeShaney* is no longer good law, both for this reason and because this Court has removed the scrutiny regime from its jurisprudence.

This Court's most recent formulation of the incorporation doctrine, in *McDonald*, is as follows:

> In answering that question [of incorporation],...we must decide whether the right [proposed to be incorporated] is fundamental to *our* scheme of ordered liberty, *Duncan*, 391 U. S., at 149, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted).

The Commissioner has subjected housing and its related facts to the *Barnette* test and concluded that they are deeply rooted in this Nation's history and tradition, and they have been consistently maintained even through the change of Constitutional regimes. The Commissioner has found that contradictory policy is a violation of Fourteenth Amendment Due Process and Equal Protection and unconstitutionally vague. The Commissioner has found that over a long history, the policy has been the maintenance of housing and its related facts. The Commissioner has found that over a long history, contradictory policy has been a matter of "[u]ltimate futility" and a "failing effort," and that such contradictory policies have

been "coercive" and "[c]ompulsory." *West Virginia v. Barnette.*

In short, the Commissioner has found that housing and its related facts are facts of human experience which, history has demonstrated, are unaffected by attempts to affect them. Thus, the interrelation of all the facts and mutual harmonization of all the rights, relating to housing, are applicable to the states through the Due Process Clause of the Fourteenth Amendment, and through their conformity with the Internal Revenue Code, the States cede jurisdiction to this Court, among them: California, Michigan, New York, Illinois, Minnesota and Arizona. The position of the states is the interrelation of all the facts and mutual harmonization of all the rights, relating to housing—as discussed above and incorporated herein by this reference—are applicable to the states through the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The position of these states is that the interrelation of all the facts and mutual harmonization of all the rights, relating to housing, as discussed above and incorporated herein by this reference.

The Secretary of the Treasury, the United States and the Commissioner do not explicitly limit the new right to the minimization of the risk of the loss of housing and housing-related facts and raising the level of scrutiny for housing and

housing-related facts, to any named group of individuals. Neither, however, do they explicitly state that these new rights are enjoyed by all individuals, and they make statements at variance with their policies, creating unconstitutional vagueness. This vagueness is unconstitutional discrimination in the context of Fourteenth Amendment Equal Protection. This vagueness is so unjustifiable as to violate Equal Protection because it is the policy of the United States, the Commissioner and the Secretary of the Treasury that housing and housing-related facts are, for purposes of Fourteenth Amendment Equal Protection, facts of human experience which history demonstrates are unaffected by attempts to affect them.

With respect to Fourteenth Amendment Equal Protection, the policy of the Commissioner, the Secretary of the Treasury and the United States, "is to withdraw [housing and its related facts] from the vicissitudes of political controversy, to place [them] beyond the reach of majorities and officials, and to establish [them as legal principle] to be applied by the courts." *West Virginia v. Barnette*.

We do not need to reach the question of justifiability, because nowhere do the Secretary, the Commissioner or the United States indicate any justifying facts to differentiate housing in applying, for purposes of Fourteenth Amendment

Equal Protection, their policy regarding housing. Indeed, all the evidence they provide—and it is compelling—is that these new rights are enjoyed by all individuals.

The Commissioner, the Secretary of the Treasury and the United States have established the policy that it is Fourteenth Amendment Equal Protection to determine the minimization of the risk of housing loss and loss of housing-related facts, and to state the new level of scrutiny for housing and housing-related facts. Their policy is that Fourteenth Amendment Equal Protection is the interrelation of all the facts and mutual harmonization of all the rights, relating to housing.

V. The Tax Court has jurisdiction as a matter of Fifth Amendment Equal Protection.

The Fourteenth Amendment is applicable, by its own terms, to the States, not to the Federal Government. However, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court said that it was absurd that the Constitution could deny the states the power to abridge equal protection of the laws, yet permit that power to the Congress. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive," reasoned Chief Justice Earl Warren. The Court thus interpreted the Fifth Amendment's due process clause to include an equal protection element. The

Third Circuit has offered a test for Fifth Amendment equal protection violations:

> **Although the Fifth Amendment contains no Equal Protection Clause, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is so unjustifiable as to be violative of due process....Accordingly, the Court has construed the Fifth Amendment to contain an equal protection guarantee."** *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 (3d Cir. 2001) (en banc opinion)

The Secretary of the Treasury, the United States and the Commissioner do not explicitly limit the new right to the minimization of the risk of the loss of housing and housing-related facts and raising the level of scrutiny for housing and housing-related facts, to any named group of individuals. Neither, however, do they explicitly state that these new rights are enjoyed by all individuals, and they make statements at variance with their policies, creating unconstitutional vagueness.

This vagueness is unconstitutional discrimination in the context of Fifth Amendment equal protection. This vagueness is so unjustifiable as to violate equal protection because it is in fact the policy of the United States, the Commissioner and the Secretary of the Treasury that housing and housing-related facts are, for purposes of Fifth Amendment equal protection facts of human experience which history demonstrates are

unaffected by attempts to affect them. With respect to Fifth Amendment equal protection, the policy of the Commissioner, the Secretary of the Treasury and the United States, "is to withdraw [housing and its related facts] from the vicissitudes of political controversy, to place [them] beyond the reach of majorities and officials, and to establish [them as legal principle] to be applied by the courts." *West Virginia v. Barnette*. We do not need to reach the question of justifiability, because nowhere do the Secretary, the Commissioner or the United States indicate any justifying facts to differentiate housing in applying, for purposes of Fifth Amendment equal protection, their policy regarding housing. Indeed, all the evidence they provide—and it is compelling—is that these new rights are enjoyed by all individuals.

The Commissioner, the Secretary of the Treasury and the United States have established the policy that it is Fifth Amendment equal protection to determine the minimization of the risk of housing loss and loss of housing-related facts, and to state the new level of scrutiny for housing and housing-related facts. Their policy is that Fifth Amendment equal protection is the interrelation of all the facts and mutual harmonization of all the rights, relating to housing.

Therefore, the Tax Court has jurisdiction over the petition. This is an individually enforceable right

to have the facts determine the outcome without any of what now-discarded custom calls deference, weighing, reasonable relation, balancing or discretion.

VI. The Tax Court has jurisdiction as a matter of the Privileges or Immunities Clause of the Fourteenth Amendment.

The United States Government has determined that housing is a *Barnette* important fact.

This Court, in *McDonald*, said, in considering whether a right arose in the *McDonald* facts under the Privileges or Immunities Clause of the Fourteenth Amendment, that "petitioners are unable to identify the Clause's full scope," that there is no "consensus on that question" and that, in any event, that there was "no need to reconsider [the *Slaughter-House* cases] interpretation here." Without having to address the "full scope," and without disturbing the *Slaughter-House* holdings, this Court in *McDonald* said that there is an individually enforceable right to *Barnette* facts under the Privileges or Immunities Clause. There was "no need" to address it in *McDonald* because the Constitution already explicitly includes the *Heller* facts in the Second Amendment and the Amendment was placed in the Constitution as a result of finding the facts were *Barnette*-style facts.

Since the United States Government has also found housing to be a *Barnette*-style fact, the Tax Court has jurisdiction as a matter of the Privileges or Immunities Clause.

VII. The Tax Court has jurisdiction as a matter of the Fourth Amendment.

The United States Government has determined that housing is a *Barnette* important fact.

This Court in *Heller* said that facts are explicitly mentioned in the Bill of Rights because they are *Barnette* facts. Housing, which is explicitly mentioned in the Fourth Amendment, is therefore mentioned there because it is a *Barnette* fact.

Indeed, the Court in *Heller* pointed out that the unamended Constitution and the Bill of Rights "use the phrase 'right of the people' two other times [in addition to its use in the Second Amendment], in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause."

The Court pointedly remarks that these are not scrutiny regime health and welfare, deference or discretion rights: "All three of these instances unambiguously refer to individual rights, not

'collective' rights, or rights that may be exercised only through participation in some corporate body."

The *Heller* Court further pointedly remarks: "Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right." The Court makes it clear that housing in the Fourth Amendment—like the right to keep and bear arms in the Second Amendment—is a right for the individual to *maintain* housing ("self-defense") not a right of Government to *determine* housing. Now the United States Government agrees.

Heller further clarifies the use of "secure" in the Fourth Amendment to mean an individually enforceable right co-terminous with the maintenance of important facts, that is, with the maintenance of the Constitution. In discussing the use of "security" in the Second Amendment, this Court says, "The phrase 'security of a free state' meant 'security of a free polity,' not security of each of the several States." This is an explicit rejection of the notion that housing is within the political system, the scrutiny regime, discretion, deference or health and welfare regulation. Since this Court found housing to be a *Barnette*-style fact, the Tax Court has jurisdiction as a matter of the Fourth Amendment.

VIII. The Tax Court has jurisdiction as a matter of liberty or of Fourth Amendment

Privileges and Immunities or of the freestanding right to housing.

Lawrence has a Fifth Amendment liberty right, not by way of incorporation—by way of liberty itself: liberty is *Barnette* facts and only *Barnette* facts, and *Barnette* facts and only *Barnette* facts, are the Constitution (the "components of liberty in its manifold possibilities"). The *Heller* case clarifies: facts are Second Amendment facts *because* they are *Barnette* facts and *Barnette* facts are the Constitution. The *Heller* facts are "'the true palladium of liberty,'" they prevent the destruction of "liberty," they are "'safeguards of liberty.'" Liberty is the Constitution. The "scheme of ordered liberty" is no longer good law. *Palko v. Connecticut*, 302 U.S. 319 (1937). As the Court noted in *McDonald*, "*our* scheme of ordered liberty" is the Constitution. Since the United States has found housing to be a *Barnette* fact, the Tax Court has jurisdiction as a matter of liberty or of the Privileges and Immunities Clause or of the freestanding right to housing.

IX. The Tax Court has jurisdiction as a matter of the tax-and-spend provision of Article I, Section 8, the Federal Reserve Act and monetization.

The most recent round of monetization occurred on November 3, 2010. See "Press

Release,"http: //www. federalreserve.gov/ newsevents/ press/monetary/ 20101103a.htm (November 3, 2010). The Court in *Heller* and *McDonald*, held that the Constitution is *Barnette* facts. The United States has held that housing and housing-related facts are *Barnette* facts. Article I, Section 8 gives Congress the power to tax and spend "for the general welfare." According to the Court, the law taxes and spends to minimize the risk of the loss of housing and housing-related facts and raising the level of scrutiny for housing. In Section 2a of the Federal Reserve Act, the United States has determined that employment, production, stable prices, moderate long-term interest rates and long run growth of the monetary and credit aggregates, are important facts. Therefore, the Tax Court has jurisdiction under Article I, Section 8, the Federal Reserve Act and monetization.

X. The Tax Court has jurisdiction as a matter of Tax Code Section 7122 and the Collection Financial Standards.

Tax Code Section 7122 provides that in collecting taxes the Service shall promulgate the Collection Financial Standards (http: //www .irs.gov / individuals/ article/ 0,,id=96543,00. html) and the Standards shall not be used to the extent "such use would result in the taxpayer not having adequate means to provide for basic living expenses." The Standards include monthly

amounts for, *inter alia*, housing, living expenses, transportation and medical care and the Standards are applied "without questioning the amount actually spent." The Tax Court has jurisdiction as a matter of the Section and Standards in conjunction with United States ownership interests in, and servicing agreements with, financial institutions and HAMP in conjunction with Revenue Ruling 2009-19. Here the policy of the United States is to minimize the risk of loss of transportation with maintenance as an indicium, and raising the level of scrutiny for transportation with maintenance as an indicium, or to minimize the loss of maintenance with transportation as an indicium, and raising the level of scrutiny for maintenance with transportation as an indicium.

Under the *Heller / MacDonald* "maintenance" regime, the Tax Court has jurisdiction because the United States, in the Section and Standards, has determined that transportation, with maintenance as an indicium, is an important fact, or that maintenance, with transportation as an indicium, is an important fact.

Respectfully submitted,
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